

September 28, 2001

THE LEGAL FEASIBILITY OF THE BI-NATIONAL SUSTAINABILITY LABORATORY ON THE UNITED STATES-MEXICO BORDER

Background

Sandia's Advanced Concept Group (**ACG**) has proposed to establish a US-Mexico Bi-National Sustainability Laboratory (**BNSL**) that will physically straddle the US-Mexico Border. The **BNSL**¹ is conceived to occupy a physical space half in the US and half in Mexico.

Scope of the study

This study concerns the legal feasibility of building and operating the **BNSL** astride the US-Mexico border.

One possible approach for this study would have been the compilation and interpretation of US and Mexican laws and regulations that theoretically could apply to the establishment and operation of the **BNSL**. This approach would have implied that the **BNSL** is not a bi-national project but a national project with extraterritorial effects. This approach would have presupposed that the core question for the legal feasibility of the **BNSL** is to draw a fictional line within the **BNSL** facility to determine where the enforcement of the US jurisdiction begins and terminates in the facility, and where the enforcement of the Mexican jurisdiction begins and terminates in the facility.

Taking seriously the vision that the **BNSL** would be a bi-national project in US and Mexican territories, we concluded that an international law approach could be more practical to determine the legal feasibility of the **BNSL**. We researched US and Mexican international law to discover whether the **BNSL** is feasible.

The study begins with a short description of basic legal aspects that will need to be considered in the negotiation between the US and Mexico for the establishment and operation of the **BNSL**. A description of the US and Mexican laws and practice concerning how both countries create international agreements follows. The report concludes with a negotiating strategy that the **ACG** could pursue in its effort to establish the **BNSL**.

¹ The **BNSL** goal is to promote sustainable economic development through the appropriate application of technology. The **BNSL** will be managed by a non-profit entity capable of accepting funds from both private and public institutions. The **BNSL** envisions accomplishing its goal through partnerships and other agreements that include bi-national sponsorship, federal, state and local cooperation, university, government and non-government collaboration and support from private and public enterprises.

Basic legal national themes for the BNSL

While the **BNSL** is consistent with the principle of international co-operation among states,² the **BNSL** could appear to be in conflict with the legal-political concept of sovereignty. Indeed, one interpretation could be that the **BNSL** is not feasible because it would signify that the US and Mexico would yield sovereignty,³ because they would have to share or renounce jurisdictional powers in the physical space of the facility.⁴

However, all states on the planet are subjects of international legal norms⁵ and sovereignty may also be used to refer to the autonomy of states and the ability to freely enter into relations with other states.

Illustrating this concept, the United States Department of State and the Mexican Secretaría de Relaciones Exteriores (SRE) have documented dozens of international agreements for cooperation between the US and Mexico in areas such as agriculture, atomic energy, aviation, boundaries, boundary waters, claims, conservation, copyright, cultural relations, customs, defense, economic and social cooperation, education, environmental cooperation, finance, forestry, health, housing, mapping, migratory workers, narcotic drugs, publications, satellites, scientific cooperation, space, taxation, telecommunication, trade and commerce, transportation, weather conditions.⁶

² See Articles 1 and 2 of the *United Nations Charter*, adopted in San Francisco in 1945. Text in <http://www.icj.cij.org>.

³ “Sovereignty has also grown a mythology of state grandeur and aggrandizement that misconceives the concept and clouds what is authentic and worthy in it, a mythology that is often empty and sometimes destructive of human values.” Henkin, Louis, *The Mythology of Sovereignty*, ASIL Newsletter March-May 1993.

⁴ The inviolability of frontiers is a rule of international law contained in the general principle of inviolability of the territorial integrity of states. Territorial integrity embraces the principle of inviolability of frontiers. However, this principle does not rule out peaceful change of frontiers made in such a manner that the universal international law is not violated and the interest of the relevant states is freely preserved. See Johnes, S.B., *Boundary Making. A Handbook for Statesmen*, Treaty Editors and Boundary Commissioners, New York, 1945, and Klafkowski, A., *Inviolability of Frontiers*, Warsaw, 1974.

⁵ See *United Nations Treaty Series (UNTS)*. It contains texts of over 34,000 bilateral and multilateral treaties in their authentic language(s), along with a translation into English and French, as appropriate. [United Nations Treaty Collection Web Site](#)

⁶ For treaties of the US see, *Treaties in Force A List of Treaties and Other International Agreements of the United States in Force as of January 1, 2000*, Department of State Publication, <http://state.gov/documents>. United States Treaties and Other International Agreements. Volumes published on a calendar-year basis beginning as of January 1, 1950 (UST). Treaties and Other International Acts Series, issued singly in pamphlets by the Department of State (TIAS). For treaties of Mexico see, *Tratados Celebrados por México, an ongoing collection of all treaties and interinstitutional agreements prepared by the SRE*. See also, *México: Relación de Tratados en Vigor*, SRE, 1998. Both are available to the public, in books, in

Exercising the ability to conclude international agreements for cooperation, the US and Mexico could negotiate the creation of the **BNSL**. However, in addition to the legal ability to conclude international agreements, both states must have interest in creating the **BNSL**.⁷

For the United States, the **BNSL** could be a tangible way of building a strategic partnership with Mexico and achieving improvements on the ground that will stimulate the two-way flow of ideas, people, and commerce across the border. The **BNSL** is a means for achieving that lofty goal through conflict prevention and an experiment for addressing border conflict areas worldwide.

For Mexico, the **BNSL** could be a way towards achieving the country's long-term vision of an open border with the free flow of goods, services, capital, and people. It is a vehicle for jointly overcoming the resource, wage, and social disparities along the border and consequently creating the necessary conditions for establishing an open border.

Also, it should be noted that the **BNSL** was conceived as a peace project lab, and that after September 11, 2001, the new international environment may constructively impact upon the vision and perception of the **BNSL** by the US and Mexico.

In short, this study assumes both that the US and Mexico possess the international legal ability to create the **BNSL** and have interest in the **BNSL**.⁸

A caveat, the precise legal framework to establish and operate the **BNSL** will depend on its precise location along the border and the legal form that the **BNSL** might take. These

compact disc and on the Internet <http://www.sre.gob.mx/> For treaties in general, United Nations Treaty Series (UNTS).

⁷ Although the international negotiation for the **BNSL** may appear overwhelming it seems relevant to recall the successful history of the International Boundary and Water Commission (**IBWC**). This entity illustrates a visionary and successful effort to jointly operate a bi-national entity located on the border. The **IBWC** has its roots in the 1848 Treaty of Guadalupe Hidalgo which established a temporary joint boundary commission to survey, mark and map the new boundary between the two countries, see *Treaty of Guadalupe Hidalgo of Peace, Friendship, Limits and Settlement Between the United States and Mexico*, signed February 2, 1848 (TS 207, 9 Stat. 922-43). The two governments in 1889 converted the boundary commission into the International Boundary Commission. See *Convention between the United States of America and the United States of Mexico to Facilitate the Carrying out of the Principles Contained in the Treaty of November 12, 1884 and to avoid the Difficulties Occasioned by Reason of the Changes which take Place in the Beds of the Rio Grande the Colorado Rivers*, signed March 1, 1889 (TS 232; 26 Stat 1512). The Water Treaty of February 3, 1944 expanded the responsibilities of the International Boundary Commission and changed its name to the **IBWC**. The Commission's jurisdiction extends along the United States-Mexico boundary and inland into both countries where the two countries have constructed international projects. See *Treaty between the United States and Mexico Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande*, signed February 3, 1944 (TS 944; 59 Stat 1219).

⁸ The **BNSL** intends to provide integrated solutions related to energy, water, agriculture, and advanced manufacturing problems entwined within the sustainable economic development in the border region.

and other aspects should be the result of negotiations between the US and Mexico. Some remarks on basic legal areas that necessarily would be considered in such negotiations are presented below.

Real property issues

In principle, US federal and state statutes, local ordinances, common law precedents as well as Mexican federal and state codes and laws may be applicable to the physical location of the **BNSL**.

Generally, legal issues relating to land use, control and real estate construction are regulated by the state or at a local level. For this reason, they may differ from state to state and municipality to municipality. On the US side of the border there are four states California, Arizona, New Mexico and Texas. On the Mexican side, there are six states Baja California, Sonora, Chihuahua, Coahuila, Tamaulipas and Nuevo Leon. There are approximately 30 counties and *municipios* along both sides of the border.⁹

In both countries as well, there are federal statutes that may complement the non-federal provisions. For example, environmental statutes exist in both the US and Mexico that impact property development: in the US, the National Environmental Policy Act of 1969 (NEPA) 42 U.S.C. 4321 *et. seq.*; and in Mexico the General Act of Ecological Balance and Environmental Protection of 1998.

In Mexico, foreigners cannot own property located within 100 kilometers (about 62 miles) within the US Mexican border.¹⁰ This area of land is known as the *restricted zone*. If a foreigner wants property in such areas, a real estate trust must be set up by a Mexican bank to hold title for the foreigner. Since foreigners are not able to enter into contracts to buy real estate, they must have a bank act on their behalf, similar to how a trust is used to hold property for minors in the US. These Mexican trusts are known as *fideicomisos*.

⁹ Attached as annex A is a map that shows states and municipalities along the US-Mexico border.

¹⁰ The Mexican Constitution was proclaimed on February 5, 1917. The Constitution contains 136 Articles that sometimes treat subject matters with great detail. Paragraph 1 of Article 27 contains the so-called Calvo Clause that concerns a myriad of economic rights and duties for Mexicans, non-Mexicans and Governments Its text is the following: “*The ability to acquire the domain of the lands and waters of the Nation will be regulated by the following prescriptions: I. Only Mexicans by birth or naturalization and Mexican associations have the right to obtain ownership of lands, waters, and their accessories, or to obtain mining or ground water concessions. The State has the power to concede the same right to foreigners, as long as after verifying with the Secretariat of Relations that they will respect the lands and waters as nationals would, and will not invoke the protection of their governments. The penalty in case of violation of the contract is loss to the Nation of the benefits that were acquired from the concessions. In a zone of one hundred kilometers distance from the borders, and fifty from the coast, no foreigners shall be permitted to acquire direct ownership of land or water for any reason. The State, in agreement with internal public interest and the principles of reciprocity, may allow foreign states to acquire real private property necessary for the direct service of their embassies or legations in the permanent place of residence of the Federal Powers.*” See English translation of the Mexican Constitution provided online by Ron Pamachena,: <http://www.fortunecity.com/victorian/wooton/34/mexico/constitution.html>.

The specific property issues can be elaborated once a physical location is decided and the legal form of **BNSL** is determined.

Tax and Customs Issues

Concerning the movement of goods to and from the **BNSL**, in the US, the Customs Service is the federal agency that enforces customs and trade laws. The federal statute is 19 USC *et. seq.* The Internal Revenue Service (IRS) is the agency liable for the enforcement and collection of taxes. The Internal Revenue Bulletin (IRB) is the authoritative instrument of the IRS for announcing all substantive ruling necessary to promote a uniform application of tax law.¹¹

In Mexico, the Secretaría de Hacienda y Crédito Público is the agency liable for the enforcement of customs and tax laws.¹²

The legal regime for customs and taxes applicable to the establishment and operation of the **BNSL** will be dependent on the legal form created through the bi-national agreement, in the context of the national tax laws and applicable double taxation treaties.

Labor Issues

Concerning the relationships between management and labor in the **BNSL**, the US law that may apply includes federal and state statutes, judicial decisions and administrative regulations. The US federal statute that regulates interstate commerce is the Federal Service Labor-Management Relations Act (FSLMRA). This act governs bargaining between employer/employee and union relationship on a national level.¹³ States extensively regulate the employer/employee bargaining relationship. State laws may also regulate employers and employees not covered by the NLRA.

¹¹ Up to date customs and tariff schedules that concern the sale of all goods and services are available on the US Customs Web Site <http://www.customs.ustreas.gov/impexpo/impexpo.htm> and the United States International Trade Commission Web site <http://dataweb.usitc.gov/scripts/tariff2001.asp> For taxes, <http://www.irs.gov/>

¹² See *Customs Law* [Ley Aduanera. 15-XII-1995](#); *General Export Tax Law*, [Ley del Impuesto General de Exportación. 22-XII-1995](#); *General Import Tax Law* [Ley del Impuesto General de Importación. 18-XII-1995](#). For information about enforcement of taxes and customs laws see [Secretaría de Hacienda y Crédito Público \(SHCP\)](#). For information about enforcement of international trade and investment see [Secretaría de Economía](#)

¹³ See Labor 29 U.S.C. *et. seq.* and Federal Service Labor-Management Relations Act (FSLMRA) [5 U.S.C. § 7101 et seq.](#) The 1947 Labor Management Relations (Taft-Hartley) Act and the 1959 Labor Management Reporting and Disclosure (Landrum-Griffen) amended the NLRA. Most employers and employees involved in businesses that affect interstate commerce are regulated by the act. The NLRA established the [National Labor Relations Board \(NLRB\)](#) to hear disputes between employers and employees arising under the act and to determine which labor organization will represent a unit of employees.

In Mexico, the labor law is federal and is found in the Mexican Constitution, Title VI Article 123 and in the 1970 Federal Labor Law (FLL).¹⁴ The enforcement of the labor law at the federal level is through the Secretaría de Trabajo y Previsión Social (STPS). At the state level, each government has a labor department in charge of enforcement of the labor law. The Conciliation and Arbitration Boards (Juntas de Conciliación y Arbitraje) handle complaints from individual workers and unions. There is a Federal Board and State Boards under the jurisdiction of state governments. All boards include representatives from government (federal or state), employers and employees.

In the context of the US and Mexican labor laws and treaties, the specific labor regime of the **BNSL** will depend on the legal framework created in the international agreement.

Immigration Issues

Foreign citizens wishing to work in the US and in Mexico need to acquire work visas.

Immigration law in the US is based on the US Constitution, (Article I Section 8), federal statutes (8 U.S.C. *et seq.*-Immigration and Naturalization), Federal regulations (8 C.F.R. Aliens and Nationality) and numerous judicial decisions. States have limited legislative authority regarding immigration and 28 U.S.C § 1251 provides the full extent of state jurisdiction.

Immigration law in Mexico is based on the Mexican Constitution (Articles 30,32,33,37, and 73), federal statutes and regulations (Law of Nationality and its Regulations and the General Population Law and its Regulations.)¹⁵

The Immigration and Naturalization Service (INS) enforces immigration laws in the US,¹⁶ and the Secretary of the Interior (Secretaría de Gobernación) is responsible to enforce immigration laws in Mexico.¹⁷

Regarding specific visa or no visa requirements of the management and workers at the **BNSL**, will depend on the legal form of the **BNSL**, composition and type of work and nationality of the individuals.

¹⁴ An English translation of the Mexican Federal Labor Law is available through a variety sources including through West Publishing West 1997 WL 686863, *et. seq.*; the InterAM Database available through the National Law Center for Inter-American Free Trade and Mexican Labor Law Summary by Francisco Breña Garduño, Breña Y Asociados, Mexico City (1996). In addition see, *Social Security Law Ley del Seguro Social, 21-XII-1995*; *Law of the National Institute for Worker Housing Fund Ley del Instituto del Fondo Nacional de la Vivienda para los Trabajadores, 24-IV-1972*. For information concerning enforcement of federal labor laws see [Secretaría del Trabajo y Previsión Social](#)

¹⁵ See General Population Act, (Ley General de Poblacion); Law of Nationality, (Ley de Nacionalidad, 23-I-1998). Regulation of the General Population Law, ([Reglamento de la Ley General de Población, 14-IV-2000.](#))

¹⁶ See <http://www.INS.gov/>

¹⁷ For information about enforcement see [Secretaría de Gobernación](#)

National Treaty Law and Practice

Since there is no existing legal framework for the **BNSL**, whichever the specific features it might possess, the legal feasibility of the **BNSL** as a bi-national project requires the negotiation of an international agreement between the US and Mexico.

Below, is a presentation of “how” international agreements are negotiated in the US and in Mexico. To accomplish this task, not only the treaty making process in itself was considered, but also interpretations of constitutional law and precedents of the judiciary regarding both the hierarchy in national law and legal nature of international agreements.

In introducing the treaty-making process in the US and in Mexico, we present two legal and cultural ways of thinking about the same theme: negotiation of international agreements.

National Treaty Law and Practice in the US

For international law, a treaty is an international agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law.¹⁸

The United States has developed a variety of means for the making of international agreements.¹⁹ In addition to government-to-government agreements, agency-to-agency agreements,²⁰ are generally considered to be international agreements. The Constitution prohibits the conclusion of international agreements by sub-national political entities such as states and counties.²¹

¹⁸ The Vienna Convention on the Law of Treaties defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” May 23, 1969, art. 2, para. 1(a), 1155 U.N.T.S. 331. Although not a party, the United States accepts that the Convention. See, S. Exec. Doc. L, at 1 (1971), Letter of Submittal from the Secretary of State to the President. *Although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice.*

¹⁹ See Robert E. Dalton, *National Treaty Law and Practice: United States*, in *National Treaty Law and Practice, Austria, Chile, Colombia, Japan, Netherlands, United States*, edited by Monroe Light, Merritt R. Blakeslee and L Benjamin Ederington, Studies in Transnational Legal Policy, No. 30, American Society of International Law, 1999.

²⁰ See *supra*.

²¹ “The members of the Federal Convention designed the Constitution to include checks and balances to enable each of the branches to protect itself against encroachments by one or both of the other branches. Indeed, the very purpose of adopting the Constitution was to replace a failed governmental structure under the 1777 Articles of Confederation. This ineffectual document created no executive power. All legislative and treaty-related power were vested in the Continental Congress and the states. Given the concise nature of the relevant Constitutional provisions and the absence of any experience in dealing with the respective

The Department of State recognizes four types ²² of international agreements: a) Treaties ratified by the Senate; b) Agreements pursuant to treaty; c) Agreements pursuant to legislation; and d) Agreements pursuant to the constitutional authority of the President.

Treaties ratified by the Senate

Article II of the US Constitution establishes a mechanism by which the President has power, *by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur...*" This provision enables the President and the upper house of the U.S. Congress to make treaties. A treaty must deal with matters of international concern and not contravene the Constitution of the United States.²³

The advice and consent procedure is used to conclude approximately 5% of U.S. international agreements. Although there are no prescribed subjects, a review of practice shows that international agreements dealing with defense, extradition, tax, disarmament, the environment, and private international law tend to be dealt with by treaties.

If the President decides a particular international agreement should be handled as a treaty under the Constitution, he will transmit it to the Senate for advice and consent to ratification, acceptance, or approval. Criteria in the State Department's regulations may help in clarifying how a particular instrument will be treated, but it is not possible to be too categorical about what agreements must be handled as treaties.

In connection with its consideration of a particular treaty, the Senate may advise the Executive of provisions that it would like to see included in similar or "follow-on" treaties. It may also adopt resolutions specifying provisions that it believes should be included or not be included in treaties under negotiation, appoint groups of Senators to monitor the status of specific negotiations and to make reports to the Senate, and require Executive Branch reports on matters relevant to application of treaties or their implementation.

roles of the executive and the Congress under the old system, the treaty-making provisions of the Constitution constituted a tabula rasa in a number of respects", Robert Dalton, *op.cit.* 189.

²² These have been codified, set forth, and designated as the "Circular 175 Procedure." Department of State, 11 Foreign Affairs Manual § 700 *et seq.* (Oct. 25, 1974). This Circular 175 provides "Considerations for Selecting Among Constitutionally Authorized Procedures". Also in A.W. Rovine, *Digest of United States Practice in International Law* 1974, at 199-215 (1975).

²³ The classic formulation of this principle may be found in the remarks of Charles Evans Hughes: "*I think it is perfectly idle to consider that the Supreme Court would even hold that any treaty made in a constitutional manner in relation to the external concerns of the nation is beyond the power or the sovereignty of the United States or invalid under the Constitution of the United States where no express prohibition of the Constitution has been violated . . . The [treaty-making] power is to deal with foreign nations with regard to matters of international concern.*" 1929 Proc. ASIL, 194 (1929).

The House of Representatives may also pass resolutions, hold hearings, require reports and otherwise communicate its views in respect of international agreements to the Executive Branch.

In almost all cases, it is possible to seek legislative approval of an agreement by both houses of the Congress. Indeed, in some cases it is politically easier for the President to obtain the support of a majority in both houses than two thirds of the Senate.

In the nineteenth century the President failed to secure the advice and consent of the Senate to a treaty of annexation with Texas. The treaty was approved by joint legislation on March 1, 1845. When the treaty for the annexation of Hawaii was delayed in the 1890's, President McKinley obtained the annexation by joint resolution approved July 7, 1898.²⁴

There are cases in which the Administration consults with the Senate as to whether or not the Senate wishes a particular treaty to be sent to it for advice and consent prior to ratification or acceptance.

Since the **BNSL** seems a typical effort of international cooperation between the US and Mexico, and subject to the opinion of the State Department, a Treaty ratified by the Senate addressing the creation of the **BNSL** could be feasible.

Agreements pursuant to treaty

The President may conclude international agreements pursuant to a treaty brought into force, whose provisions constitute authorization for the agreement by the Executive without subsequent action by the Congress. For example, for boundary water related issues and for environmental cooperation, the US and Mexico may conclude international agreements based on previous treaties.²⁵

However, after a revision of the existing international agreements between the US and Mexico, it seems that there is no existing Treaty between the US and Mexico that specifically authorizes the Executive to negotiate the creation of the **BNSL**.

Agreements pursuant to legislation

The President may conclude an international agreement on the basis of existing legislation or subject to legislation to be enacted by the Congress. Statutes authorizing

²⁴ George H. Haynes, *The Senate of the United States: Its History and Practice* 633-35 (1938).

²⁵ See *Treaty between the United States and Mexico Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande*, signed February 3, 1944 (TS 944;59 Stat 1219) and *Agreement on cooperation for the protection and improvement of the environment in the border area*, signed at La Paz, August 14, 1983 (TIAS 10827; 1352 UNTS 67).

negotiation of certain types of agreements require the transmittal of those agreements to the Congress prior to their entry into force; others require specific approval of the texts.²⁶

The Congress in the exercise of its legislative function may authorize approval of other agreements negotiated by the President where he cannot rely on his independent Constitutional powers.²⁷

For example, the President has no independent Constitutional authority to exempt non-citizen employees working for international organizations from state income taxes. However, the Congress has such power; and the President and the Senate acting pursuant to the treaty power have such power.²⁸ To solve this issue, an agreement between the United States and the interested international organizations was negotiated. It was then decided to seek authorization from the Congress for the President to conclude such an agreement (rather than to send the text to the Senate for advice and consent to ratification). In April 1994, the Congress authorized the President *"to bring into force for the United States the Agreement on State and Local Taxation of Foreign Employees of Public International Organizations, which was signed by the United States on April 21, 1992 . . ."*²⁹ On May 14, 1994, he did so.

²⁶ For example, the *Atomic Energy Act of 1954*, as amended, requires the transmittal of Nuclear cooperation Agreements to Congress for 90 continuous session days to afford it an opportunity to disapprove by joint resolution. 42 U.S.C.A. §§ 2153 & 2159 (g), (h), & (i) (1994 & Supp. 1997). The *Fishery Conservation and Management Act of 1978*, as amended, requires a 60-day waiting period for Governing International Fisheries Agreements, but no specific approval. 16 U.S.C.A. § 1823 (Supp. 1997). A more limited provision of this character appears in the *National Aeronautics and Space Administration Authorization Act of 1988* which required *"the Intergovernmental Agreement currently being negotiated between the United States Government"* and other governments, as well as any *"memoranda of understanding being negotiated between counterpart agencies in Canada, Japan, and Europe concerning the detailed design, development, construction, operation, or utilization of the space station,"* to be submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Science, Space, and Technology of the House of Representatives 30 days prior to their entry into force. National Aeronautics and Space Administration Authorization Act, Pub. L. No. 100-147 § 112, 101 Stat. 860 (1987) (codified at 42 U.S.C. § 2451 note (1994)).

²⁷ An example is Public Law 92-448, a *Joint Resolution approving and authorizing the President to accept an Interim Agreement Between the United States and the U.S.S.R. on Certain Measures with Respect to Limitation of Strategic Offensive Arms*. Pub. L. No. 92-448, 86 Stat. 746 (1972). Section 2 of the law embodies the standard model: *"The President is hereby authorized to approve on behalf of the United States the interim agreement between the United States of America and the Union of Soviet Socialist Republics on certain measures with respect to the limitation of strategic offensive arms, and the Protocol related thereto, signed at Moscow on May 26, 1972 . . ."* Pub. L. No. 92-448, § 2, 86 Stat. at 747.

²⁸ See, *Articles of Agreement of the International Monetary Fund*, December 27, 1945, art. IX, § 9(b), 60 Stat. 1401, 1414, 2 U.N.T.S. 40, 76 and *Articles of Agreement of the International Bank for Reconstruction and Development*, December 27, 1945, art. VII, § 9(b), 60 Stat. 1440, 1458, 2 U.N.T.S. 134, 182.

²⁹ Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, § 421, Pub. L. No. 103-236, 108 Stat. 382, 456 (1994).

The Omnibus Trade and Competitiveness Act of 1988 and the Trade Act of 1974, as amended, contain special provisions relating to Congressional approval of agreements on the elimination of non-tariff barriers and bilateral agreements regarding tariff and non-tariff barriers. Those procedures, known informally as "*fast track*" procedures, require that the President notify the Congress concerning the initiation of negotiations and submit the text of the agreement for legislative approval.³⁰ Agreements concluded under these delegations are sometimes referred to as Congressional-Executive Agreements.

Under the Constitution, the Congress has power over foreign commerce. During the 1930's, the Congress passed reciprocal trade agreement acts that gave the President authority to negotiate tariff reductions with the trading partners. The special procedure known as "*fast track*" was put in place during the Ford Administration to strengthen the partnership between the President and the Congress by streamlining the approval process for trade agreements.

Under those procedures, the President notifies the Congress that he is opening negotiations. He submits the text of an agreement to the Congress, each House of which must vote to accept or reject the proposal within sixty legislative days. No amendments are permitted.³¹

If the international agreement relates to matters solely within the power of the legislature, the President will need approval unless the Congress has delegated the power to make agreements in those fields or is considered to have acquiesced without the necessity of seeking specific approval.³²

To our knowledge there is no existing legislation that authorizes the President to negotiate the **BNSL**. If the **BNSL** were negotiated based on existing legislation, the Congress would have to enact new legislation for that purpose.

³⁰ 19 U.S.C. § 2112.

³¹ 19 U.S.C. § 2191. Fast track procedures used in lieu of Senate advice and consent to approve a trade agreement occurred in connection with approval of the *North American Free Trade Agreement* (NAFTA) in 1993 and the *Uruguay Round Agreements* in 1994. Both international agreements did not require approval by the Senate as a treaty, but could constitutionally be executed by the President and approved and implemented by Act of Congress. The Memorandum of November 22, 1994, "Whether Uruguay Round Agreements Required Ratification as a Treaty", appears in United States Department of Justice, *Selected Opinions of the Office of Legal Counsel: August 1993-March 1995*. Laurence H. Tribe, *The World Trade Organization and the Treaty Clause: The Constitutional Requirement of Submitting the Uruguay Round of GATT as a Treaty*, Prepared Statement before Senate Committee on Commerce, Science, and Transportation (Oct. 18, 1994). See Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994). Message to Congress Transmitting the Proposed "Export Expansion and Reciprocal Trade Agreements Act of 1997," 33 Weekly Comp. Pres. Doc. 1344 (Sept. 16, 1997).

³² See discussion of *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

Agreements pursuant to the constitutional authority of the President

The President may conclude an international agreement on any subject within his constitutional authority so long as the agreement is not inconsistent with legislation enacted by the Congress in the exercise of its constitutional authority.

Article II of the Constitution deals with the powers of the Executive. Four of the provisions of that article have been held to give the President the power to make international agreements other than "*treaties*". They are: the Commander-in-Chief Power; the power to receive Ambassadors and other public Ministers; and the duty to take care that the laws be "*faithfully executed*".

Where the powers granted to the President are exclusive -- as the Commander in Chief power -- the President may make an international agreement solely on his own. Such agreements are often called sole executive agreements. The classic illustration is the armistice agreement.

Congress attempted and ultimately failed, during the 1970's, to limit the President's Constitutional power to negotiate and conclude executive agreements on the basis of the Article II powers set out above. The October 31, 1975 memorandum entitled "*Authority of the President to Enter Into Executive Agreements Pursuant to His Independent Authority*" is a convincing presentation of that authority.³³

United States courts are generally reluctant to decide disputes between members of Congress and the President concerning the treaty-making power. Such cases are usually dismissed on the ground that the issue is a non-justiciable political question or that the plaintiff lacks standing to bring the case.³⁴

It is clear that a sole executive agreement made by the President on his independent Constitutional authority is the law of the land and supersedes state law under Article VI of the Constitution. However, if he concludes an agreement in an area in which he lacks both independent authority and Congressional approval, he will in most cases fail.³⁵

³³ *Congressional Oversight of Executive Agreements -- 1975, Hearings Before the Subcommittee on Separation of Powers of the Committee on the Judiciary, United States Senate, 94th Cong., 1st Sess. on S. 632 and S. 1251 at 306-11 (1975).*

³⁴ *Congressional Oversight of Executive Agreements: Hearing before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 92d Cong., 2d Sess. on S. 3475 (Washington: U.S. Government Printing Office, 1972). Congressional Oversight of Executive Agreements - 1975: Hearing before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. (Washington: U.S. Government Printing Office, 1975).*

³⁵ For example, after consultations with the Senate Foreign Relations Committee staff with respect to the *Budapest Treaty on the International Recognition of Deposit of Microorganisms for Purposes of Patent Procedure*, the Legal Adviser recommended to Secretary of State Cyrus R. Vance that the treaty be

In conclusion, under the advice of the State Department, through a government-to-government agreement, or through an agency-to-agency agreement, the establishment of the **BNSL** could be negotiated with Mexico.³⁶ This international agreement needs to be consistent with legislation enacted by the Congress.

The role of the State Department

Whichever legal form the US pursues to enter into international agreements, the Secretary of State is responsible, on behalf of the President, for ensuring that all proposed international agreements of the United States are fully consistent with US foreign policy objectives.

Even when other department or agency has independent statutory authority to conclude agreements of a specific kind, the Secretary of State has the power to determine for and within the executive branch whether an arrangement constitutes an international agreement within the meaning of the Act.³⁷

In any event, any agency wishing to conclude an international agreement must transmit to the Department of State for consultation a draft text or summary of the proposed international agreement, a precise citation of the Constitutional, statutory, or treaty authority for such agreement, and other background information.

"If a proposed agreement embodies a commitment to furnish funds, goods, or services that are beyond or in addition to those authorized in an approved budget, the agency proposing the agreement shall state what arrangements have been planned or carried out concerning consultation with the Office of Management and Budget for such commitment. The Department of State should receive confirmation that the relevant budget approved by the President provides or requests funds adequate to fulfill the proposed commitment, or that the President has made a determination to seek the required funds."³⁸

Most agreements entered into by the United States do not require approval of the legislature prior to ratification or other form of acceptance. A relatively small number of

concluded as an executive agreement. On August 31, 1979, Secretary Vance signed an instrument of acceptance of this treaty, which was subsequently deposited with the Director General of the World Intellectual Property Organization.

³⁶ Example of government to government international agreement, *A Memorandum of Understanding on Education between the Government of Mexico and the Government of the US*, Mexico City, 7 May 1996. Example of agency to agency international agreement, *A Memorandum of Understanding between the Smithsonian Institution from the US and the Consejo Nacional para la Cultura y las Artes from Mexico*, Washington, D.C. 16 May 1995.

³⁷ Foreign Relations Authorization Act, Fiscal Year 1979, § 708, Pub. L. No. 95-426, 92 Stat. 993 (1978).

³⁸ *Id.* § 181.4(e).

these agreements are sole executive agreements entered into by the President under certain of his independent powers – for example, the commander in chief power under the Constitution.

The Department of State's regulations on treaties provide that "where, in the opinion of the Secretary of State or his designee the circumstances permit, the public be given an opportunity to comment on treaties and other international agreements."³⁹

The objective is to ensure that no interest is denied an opportunity to be heard during the negotiating process.

Model tax treaties, model extradition treaties, and a number of draft treaties in the private international law area have been published in the Federal Register for comment.⁴⁰ The meetings of the Advisory Committees and of the Study Groups are subject to the provisions of the Federal Advisory Committee Act, open to the public, and announced in advance in the Federal Register.

In other contexts, industry representatives or members of the public serve as members of U.S. delegations to international meetings at which treaties are being negotiated.⁴¹

National Treaty Law and Practice in the Mexico

A few years after the opening of Mexican markets to world competition, and in light of the imminent beginning of the NAFTA negotiations, the government saw the need for measures that would prepare the country for the new international legal commitments just over the horizon.⁴² The 1991 Treaty Law was the legal response to the stated challenge.⁴³

The President and the Senate

The President is the sole authority for negotiation and signing of treaties according to paragraph X of Article 89 of the Constitution that indicates the rights and duties of the President. It reads:

“The powers and obligations of the President are the following:

³⁹ § 720.2 (d).

⁴⁰ E.g., on November 12, 1976, the Department of State published a draft bilateral extradition treaty for that purpose. 41 Fed. Reg. 51,897-51,899 (1976).

⁴¹ For guidelines concerning participation of private citizens as representatives of affected private sector interests on U.S. delegations to international conferences, meetings and negotiations, see the Department of State's Public Notice 655 of March 23, 1979, 44 Fed. Reg. 17,846 (1979).

⁴² See the book prepared by the International Trade Cabinet in 1986: *El proceso de adhesión de México al Acuerdo General sobre Aranceles Aduaneros y Comercio Exterior (GATT)*.

⁴³ *Law Regarding the making of Treaties*, December 21, 1991; effective, January 3, 1992, in 31 I.L.M. 390 (1992).

X. Direct foreign policy and conclude international treaties, and submit them to the approval of the Senate: In the conducting of this policy, the head of the Executive Power will observe the following standard principles: self-determination of peoples, non-intervention, peaceful resolution of disputes, juridical equality of states, international cooperation for development, and the struggle for international peace and security.”

The President of the Republic must submit to the Senate for its approval, all treaties that he has concluded and which he intends to ratify. In accordance with Article 133 of the Constitution only those treaties approved by the Senate that do not conflict with the Constitution become part of the “*Supreme Law of all the Union.*”

The Legislative Power of Government rests on a General Congress, which is divided into two chambers: the Chamber of Deputies composed of 500 representatives of the people (Article 50); and, the Chamber of Senators composed by 128 senators representing the 31 States of the Federation and the Federal District (Article 56).

The Chambers have shared authority in some matters, and exclusive authority in others. Article 76, paragraph I establishes the exclusive authority of the Chamber of Senators to “*...approve international treaties and diplomatic conventions that the Executive of the Union concludes.*”

This Constitutional provision operates as follows. After the treaty is signed, the SRE, through the *Secretaría de Gobernación* (SG), submits to the Senate those treaties for which the President of the Republic seeks final approval. The SG is the entity that manages and maintains the balance in the relationship among the Executive, Legislative and Judicial Powers of the Federal Government.

The Senate has different standing commissions that study matters on specific subjects. Once a treaty reaches the Senate, it is turned to the Commission of Foreign Relations for its analysis and discussion. Depending on the subject matter of the treaty under consideration, other commissions will also participate in this process. Each Commission issues a report that is submitted to the floor of the Chamber of Senators. The floor undertakes a “first reading of the report” and subsequently schedules a “second reading.” During these readings, an over-all and article-by-article analysis is done. At the conclusion of this phase of the approval process, the Chamber of Senators issues the minutes of the readings and in case there is a motion of approval, the minutes will include a draft of the approval decree. In cases when the Mexican Government intends to make a reservation or interpretative declaration, the Chamber of Senators also has to approve them.

All resolutions by Congress are issued through a law or decree (Article 70 of the Constitution). In the case of the approval of a treaty, the resolution of the Senate is a decree signed by the President of the Chamber of Senators.

The Senate's decree is sent to the SG, and to the President of the Republic, who in accordance with Article 89, paragraph I of the Constitution will issue a decree ordering the publication and observance of the Senate decree approving the treaty. The SG then publishes the President's decree in the *Diario Oficial de la Federación* (Federal Official Gazette).

Upon the completion of the approval procedure described above, the international ratification of the treaty may be undertaken. The President of the Republic has exclusive authority for the ratification process as provided by Article 89, paragraph X of the Constitution.

Treaty Law

Article 2 of the Treaty Law ⁴⁴ defines the term "treaty":

"An agreement governed by public international law, entered into in writing between the Government of the United Mexican States and one or various subjects of public international law, pursuant to which the United Mexican States undertakes obligations, and without regard to whether its application requires the making of agreements in specific matters, and without regard to its name. In compliance with Article 76, paragraph I of the Political Constitution of the United Mexican States, treaties must be approved by the Senate and pursuant to Article 133 of the Constitution, be the Supreme Law of all the Union."

This definition is compatible with the 1969 Vienna Convention on the Law of Treaties ⁴⁵ and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations. ⁴⁶

Recognizing that Mexico is a Party to the 1969 Vienna Convention and as such that the Convention is part of the Mexican law, the Treaty Law only indicates a few rules that are distinctive within the national legal system. The law establishes that treaties can only be entered into by the Federal Government of the United Mexican States; that they require approval by the Senate; that, when consistent with the Constitution, they become the Supreme Law of the Union; and, that treaties are binding in the national territory only after they have been published in the Federal Official Gazette.

⁴⁴ See *Ley de Tratados*, SRE, 1992. Mexico: SRE, 1992. This book includes the Mexican President's Presentation of the Treaty Draft Law before the Congress, the discussion and Opinions on the Draft Law by both the Senate (Cámara de Senadores) and the Chamber of Deputies (Cámara de Diputados), and the Treaty Law as adopted. An analysis of the Treaty Law in Díaz, L. M., *Ley Sobre La Celebración de Tratados*, in *La Modernización del Derecho Mexicano*, México: Editorial Porrúa, 1994, 770-779.

⁴⁵ Text in English, 8 I.L.M. 679 (1969). Text in Spanish, *Diario Oficial de la Federación* 14/2/75.

⁴⁶ In 25 I.L.M. 543 (1986), ratified by Mexico 10/03/88.

The Treaty Law fosters order and coherence in all actions undertaken to enter into any treaty by reiterating the coordinating authority of the Secretaría de Relaciones Exteriores (SRE) in all such actions. The SRE shall prepare an opinion about the propriety of entering into any treaty. The Chamber of Deputies considers this opinion to be binding upon any agency of the Federal Public Administration involved in making the treaty, without prejudice to the ultimate decision of the President of the Republic.⁴⁷

In conclusion, recognizing the spirit of cooperation that inspires the **BNSL** and under the advice of the Secretaría de Relaciones Exteriores, a Treaty establishing the **BNSL** could be negotiated by Mexico with the US.

Interinstitutional Agreements

The Treaty Law breaks new ground by authorizing centralized or decentralized agencies of the Federal, State or Municipal Public Administration to enter into international interinstitutional agreements.

Article 2, II of the Treaty Law defines an inter-institutional agreement as:

“An agreement governed by public international law, entered into in writing between any centralized or decentralized agency of the Federal, State or Municipal Public Administration and one or more foreign government agencies or international organizations, whatever its denomination, and without regard to whether or not it arises out of a previously approved treaty. Interinstitutional agreements must be strictly circumscribed by the scope of authority of the above-mentioned agencies that may execute them on respective levels of government.”

Interinstitutional agreements are not treaties. Article 117, paragraph I of the Constitution prohibits states of the Federation to enter into any alliance, treaty or coalition with any other state or country. The capacity of centralized or decentralized agencies of the Federal, State or Municipal Public Administration to enter into these agreements is clearly circumscribed by their legal sphere of authority. Therefore, they are only binding upon those agencies, which have entered into them, and not upon the Federation, as are treaties. Consequently, these agreements do not have to be approved by the Senate and correspond to what international lawyers refer to as “international executive agreements,” that is, treaties that are negotiated based on the sole powers of the Executive.

Article 7 of the Treaty Law, fosters order and coherence in all actions undertaken to enter into interinstitutional agreements, by ordering:

“The centralized and decentralized agencies of the Federal, State or Municipal Public Administration, shall keep the Department of Foreign Affairs informed about any interinstitutional agreement that they plan to enter into with other foreign governmental agencies or international organizations. The Department

⁴⁷ *Ley Tratados*, footnote 44.

shall prepare a report about the propriety of entering into it, and when appropriate, will inscribe it in the corresponding Registry.”

Interinstitutional agreements may be negotiated directly by the agencies interested or with the support of the SRE. The legal Adviser’s office of the SRE, analyzes the draft of the interinstitutional agreements, considering the information offered by the agencies regarding the motivation to enter into the agreements and the Mexican applicable law. The Legal Adviser’s Office may confer with other offices of the SRE, and the SRE may confer with other agencies of government, which might be interested in the subject of the agreements.

Upon completion of an analysis of the interinstitutional agreement and after convening the necessary consultations, the SRE issues a report. The report on the propriety of interinstitutional agreements assures that they do not exceed the legal sphere of authority of the relevant agencies, which enter into them, or interfere with the attributions of the Federal Government or contravene Mexican foreign policy. The Chamber of Deputies considers such SRE reports as authorization to enter into the interinstitutional agreement.⁴⁸

If the report is unfavorable, the agencies interested may submit to the SRE new elements that may be useful to reassess the report. Once signed, all interinstitutional agreements must be sent to the SRE to be registered. The Registry is public.

Under the advice of the Secretaría de Relaciones Exteriores, an interinstitutional agreement creating the **BNSL** could be negotiated between US and Mexican governments or agencies.⁴⁹

The role of the Secretaría de Relaciones Exteriores

Based on Article 90 of the Constitution, the *Ley Orgánica de la Administración Pública Federal* (LOAPF) distributes the exercise of the President’s powers among the various Departments (Secretarías). As instructed by Article 28 of the LOAPF, the everyday practice of treaty making is a responsibility of the SRE. Other agencies and entities of the Federal Government shall undertake the negotiation of all treaties and inter-institutional

⁴⁸ *Ley de Tratados*, footnote 44.

⁴⁹ Example of an international agreement between the US and Mexico that is the *Agreement for Energy Cooperation, with annex, between the Mexican Secretary of Energy and the Department of Energy of the US*, signed at Mexico, May 7, 1996 included both in *Treaties in Force A List of Treaties and Other International Agreements of the United States in Force as of January 1, 2000*, Department of State Publication, and in *Tratados Celebrados por México, an ongoing collection of all treaties and interinstitutional agreements prepared by the SRE*, as an interinstitutional agreement. Another example of an interinstitutional agreement, *Agreement on academic, scientific and cultural cooperation between the Universidad Autónoma de Chihuahua and the University of New Mexico*, Albuquerque, NM, 4 October 1993.

agreements in conjunction with the SRE. Article 6 of the Treaty Law develops the LOAPF. It proclaims:

“The Department of Foreign Affairs, without affecting the exercise of the attributions of the agencies and entities of the Federal Public Administration, will coordinate the actions necessary for the making of any treaty and prepare an opinion about the propriety of executing it, and after execution, will inscribe it in the appropriate Registry.”

According to Article 9 of the *Reglamento Interior de la SRE* (Internal Rules of the SRE), matters related to treaties and interinstitutional agreements are concentrated in the Legal Adviser’s Office.⁵⁰

Concerning bilateral treaties, the SRE proposes or analyzes initiatives and coordinates government actions that may lead to their formalization.

In order to conclude multilateral treaties, the SRE promotes, by their own initiative or by that of some other agencies or entities of the Federal Public Administration, Mexico’s participation in international conferences.

During the negotiating processes, the SRE carries out consultations, compiles opinions of other agencies and entities of the Federal Government, whether centralized or decentralized, that would be responsible for implementing the treaty being negotiated.

The substantive negotiation of treaties on specific subjects, which are within the authority of an entity of the Federal Government, may be carried out by the entity responsible according to Mexican law. Continuous communication and coordination with the SRE must exist throughout this process.

When treaties of great relevance for their social, economical or political implications are being negotiated, representatives of different agencies of the Executive involved in such negotiation, shall appear before Congress, to explain the rationale and basis behind the negotiation. This has been encouraged when there is a need to inform public opinion, as in the cases of the negotiations to enter into the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA).

At the conclusion of negotiations, the SRE, as established in Article 6 of the Treaty Law, issues a report with respect to the proposed treaty. The Legal Adviser’s Office prepares a report, as established in Article 9 of the Internal Rules of the SRE. This report addresses any legal issues raised by such treaty and includes an assessment of whether the formalities required by international law and practice for the conclusion of such proposed

⁵⁰ See *Guía Para La Conclusión de Tratados y Acuerdos Interinstitucionales en el Ámbito Internacional Según La Ley Sobre La Celebración de tratados*, Mexico: SRE, 1998.

treaty have been observed. The report also includes an assessment on its congruence with domestic law and policy.

If the report proves to be favorable, the formalization of the document containing the treaty will be undertaken. If it is not favorable, the entities of the Federal Government involved in the negotiation of the treaty will have to provide new elements so that the SRE may reconsider the report on the proposed treaty.

Upon the favorable completion of the review by the SRE, the signing of the treaty may take place. The Mexican representative who signs the treaty must first receive full powers from the President of the Republic, through an Executive Decree, which is endorsed by the Secretary of SRE.

By virtue of Article 7 of the 1969 Vienna Convention on the Law of Treaties, the President of the Republic and the Secretary of Foreign Affairs do not need full powers to execute any act related to the conclusion of treaties. Mexican Heads of Diplomatic Missions also, do not require full powers to adopt the text of a treaty between Mexico and the State before which such person is accredited. Finally, representatives accredited by Mexico in an international conference, or an international organization or one of its agencies also do not require such powers for the adoption of the text of a treaty in such conference, organization or agency, but it is customary to give them this authority.

In the case of multilateral treaties, the SRE will deposit the instrument of ratification as established in each treaty. In the case of bilateral treaties, instruments of ratification may be exchanged or in treaties that do not require such exchange, the Department will carry out an exchange of formal notes through which the Parties inform each other that the approval procedure has been completed.

Immediately after ratification, the SRE prepares for the President a decree by which the treaty is promulgated, so it may enter into force. The Secretary of the SRE must endorse the decree. This decree, which includes the complete text of the treaty, is published in the Federal Official Gazette, in accordance with Article 4 of the Treaty Law, which establishes that "...treaties will be binding in the national territory only after they have been published in the Federal Official Gazette."

In conclusion, treaties and interinstitutional agreements celebrated by Mexico require the participation of the SRE.

Possible Negotiation Strategies

The research for this study did not show any insurmountable obstacles in the US or Mexican legal systems that would prevent the international creation of the **BNSL**.

The **ACG** should develop a proposal for the creation of the **BNSL** to be submitted to possible Mexican partners. This process needs to be approached respecting the true spirit of bi-nationality. Rather than develop the details solely on its own initiative and then

market the concept to the Mexican partners, the **BNSL** needs first to find a Mexican partner, associate or advocate.

The partners collaboratively must prepare a joint Project concerning the establishment of the **BNSL** that must be presented in each country to find political, economic and scientific endorsements.

With political, scientific and economic support, the Project of the **BNSL** must be transmitted to the Department of State in the US and to the Secretaría de Relaciones Exteriores in Mexico.

These offices should develop a draft text of the proposed agreement and suggest agencies and entities of the Federal, State and Local Government, whether centralized or decentralized, in each country that could be involved in the international negotiation of the **BNSL**.

In light of the US practice concerning international agreements, the international creation of the **BNSL** could take two possible forms:

- a) A treaty ratified by the Senate.
- b) An international agreement pursuant to the constitutional authority of the President.

From the perspective of Mexican practice concerning international agreements, the creation of the **BNSL** could take two possible forms:

- a) A treaty ratified by the Senate.
- b) An inter-institutional agreement.

Although the decision to create the **BNSL** could be through a treaty or other international agreement, it must be made at the federal level of both countries and is a political rather than a legal determination. For practical purposes, we think negotiating an international agreement between Sandia and a Mexican agency would be the best option for the establishment and operation of the **BNSL**.

If Sandia pursues this avenue to create the **BNSL**, Sandia would need to negotiate an international agreement pursuant to the constitutional authority of the President according to the US practice; and request that the Mexican agency use an interinstitutional agreement according to the Mexican practice. The international agreement creating the **BNSL** would be internationally binding for both agencies as long as it does not exceed the legal sphere of authority of the two agencies, or interfere with the attributions of their Federal Government, or contravene their Constitutions, laws and foreign policy.

Apart from the corporate, organizational and administrative issues that would be incorporated, such an agreement would consider provisions concerning real estate, tax, customs, labor and immigration that will apply in the facility. Therefore, in addition to

Sandia and its Mexican counterpart, other authorities or agencies with jurisdiction on the stated legal provisions will have to participate.

In conclusion, the establishment and operation of the **BNSL is legally feasible under international law recognized by the US and Mexico.**

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